BRIEF IN SUPPORT OF PETITION

POINT I.

The fact that a passenger has placed himself in a position of danger, even by reason of his own act of negligence, does not discharge an ocean carrier from its continuous duty of taking whatever steps it can to prevent the passenger from receiving injury because of his position of danger.

The difference in the degree and duty of care owed by a carrier to a passenger as stated in the instant case in the majority opinion of the Circuit Court of Appeals, namely "that common carriers are bound to exercise a high degree of care" (p. 906), from the degree and duty as stated by the Presiding Judge in his dissenting opinion, namely "extreme care which the law exacts of a carrier of passengers" (p. 908); is we believe of importance because it illustrates the error which, variously expressed, permeates the majority opinion, and the conflict of that opinion with the decisions of this court, of other Circuit Courts of Appeals, and of its own prior decisions.

The carrier's duty of care for the safety of passengers at all times is thus expressed in *Pennsylvania Company* v. *Roy,* 102 U. S. 451, at 456:

> "The carrier is required, as to passengers, to observe the utmost caution characteristic of very careful, prudent men. He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill. * * * For the slightest negligence or fault in this regard, from which injury results to the passenger, the carrier is liable in damages."

This duty as thus defined is equally applicable to common carriers by sea and enforced in admiralty causes of action (*The Arabic,* 34 Fed. [2d] 559, at 562, aff'd 2 C. C. A., 50 Fed. [2d] 96; *Boston & Yarmouth S. S. Co.* v. *Frances,* 1 C. C. A., 249 Fed. 450; *The Garden City,* 26 Fed. 766, at 774; *Admiral Peoples,* 9 C. C. A., 1935 Am. Maritime Cases 765; *The Manhasset,* 19 Fed. 430, 433).

For even the slightest neglect in the discharge of this duty the carrier is liable: *City of Panama,* 101 U. S. 453, 462; *Philadelphia & Reading RR. Co.* v. *Derby,* 55 U. S. 486.

The fact that a passenger has placed himself in a position of danger by his own act of negligence does not discharge the carrier from its duty of continuing to exercise this highest degree of care placed upon it to look out for the safety of passengers at all times, nor does it reduce or lessen the duty in any way. In *Chunn* v. *City and Suburban Railway of Washington,* 207 U. S. 302, in which a female passenger had placed herself in a position of danger by her own negligent act, this court said at page 309:

> "If she carelessly placed herself in a position exposed to danger, and it was discovered by the defendant in time to have avoided the injury by the use of reasonable care on its part, and the defendant failed to use such care, that failure might be found to be the sole cause of the resulting injury."

The right of a passenger to recover from a carrier despite the fact that the passenger has by his own negligence exposed himself to danger is thus stated in Hutchinson on Carriers, 3rd Edition, Vol. 3, Sec. 1173, page 1368:

> "* * * such right will not be barred if the carrier, after becoming aware of the exposed position of the passenger, failed to exercise a reasonable degree of care and caution to avert the injury. The

> imprudence of the passenger in placing himself in a situation of peril does not dissolve the contract of carriage, nor relieve the carrier from the duty of protection which the passenger may rightfully demand under it. If, therefore, the passenger negligently exposes himself to danger, and the carrier knows, or under the circumstances ought to know of the danger to which he is exposed, it is the carrier's duty to exercise such reasonable care and caution as the situation of the passenger demands to protect him from injury. And if, with knowledge that the passenger has assumed a position of danger, the carrier omits to exercise such reasonable care and caution to avoid causing him injury, such omission will be considered in law the proximate cause of the injury, and the carrier will be liable, notwithstanding the prior negligence of the passenger."

In *Weisshaar* v. *Kimball S. S. Co.,* 128 F. 397, a passenger boarded a small boat to be taken out to a steamer. The boat was heavily overloaded and the officer in charge of the boat warned the passengers of the danger and ordered that some get out. This was done but the passengers again boarded the boat. The officer in charge of the boat again warned the passengers of the danger but when they refused to leave he nevertheless caused the boat to leave in its overloaded condition. The boat encountered heavy seas, capsized, and several of the passengers were drowned. The lower court held the death of the passenger involved in the suit was due solely to his own negligence in boarding this obviously overloaded boat in direct disobedience of the instructions of the officer and in spite of the officer's warning not to do so because of the danger. The Circuit Court of Appeals for the Ninth Circuit, however, in modifying the opinion of the District Court held that the passenger's negligence in staying in the overloaded boat and not getting out when instructed to do so did not defeat a recovery in view of the officers subsequent

neglect to avoid the consequences of the passenger's negligence by refusing to let the boat proceed from the shore,

> "for, even where an injured party is guilty of contributory negligence, such negligence will not defeat the action when it is shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence" (p. 401).

In the instant case even if, as the majority decision of the Circuit Court of Appeals for the Second Circuit held, notice was given to libellant by the presence of a piece of rope across the top of the steps leading to the platform around the pool that libellant was not to go into the pool, the notice thus given, "by implication," as the Presiding Judge described it, certainly had no greater effect than the direct warning given orally by the officer to the passengers in the *Weisshaar* case. Nor should the implied notice thus given by the presence of the rope have barred libellant from any recovery in the instant case when respondents' attendant Jensen and their master-at-arms Gisbart admittedly saw petitioner obviously intending to enter the pool, and though they knew this was dangerous, made no effort to warn libellant of the dangers of which he was unaware, and made no attempt in any way "to avoid the consequences" of libellant's negligence in passing the rope.

In *The Steam Dredge No. 1,* 134 Fed. 161, libellant was injured by the breaking of a bitt on which he was sitting and around which a line ran. The bitt broke as the result of excessive strain put upon it by the negligent operation of the winch. The lower court granted libellant a recovery in full, although conceding that libellant occupied a dangerous position when he sat on the bitt with the line running around it. The negligence of libellant in placing himself in this dangerous position, the lower court held, was not the proximate cause of his injuries since the operator of

the winch saw the dangerous position of libellant and could have avoided causing him any injuries in spite of his dangerous position, if the winch had been operated properly. The Circuit Court of Appeals for the First Circuit, however, held that libellant's negligence in placing himself in his position of danger contributed in bringing about his injuries and accordingly divided the damages. It affirmed the holding of the District Court that the mere fact that libellant had negligently placed himself in a position of danger did not defeat his right of recovery.

In *The Arabic,* 50 Fed. (2nd) 96 a number of passengers had placed themselves in positions of danger in steamer chairs on the deck of a vessel while she was rolling and pitching in a hurricane. Although it was claimed that warning had been given to some of these passengers, the Circuit Court of Appeals for the Second Circuit held (p. 99) that not only should warning have been given to the passengers that they occupied positions of danger but that it should have been given in such a manner as to bring home to them an appreciation of their danger.

The principle that a passenger who negligently places himself in a position of danger does not thereby discharge the carrier from its duty of exercising the highest degree of care in looking out for the safety of that passenger has been uniformly applied by the state courts:

Augusta Railway & Electric Co. v. *Smith,* 121 Georgia 29;

St. Louis, I. M. & S. Railway Co. v. *Loyd,* 109 Ark. 579, 583;

Willmott v. *The Corrigan Consol. St. Ry. Co.,* 106 Mo. 535, 542, 543;

Gage v. *St. Louis Transit Co.,* 211 Mo. 139;

Birmingham Railway Light & Power Co. v. *Bynum,* 139 Ala. 389;

Carrico v. *West Virginia Cent. & P. Ry. Co.*, 39 W. Va. 86, 99-101;
So. Covington, etc., Ry. v. *McCleave*, 18 Kentucky Law Rep. 1037.

In *Birmingham Railway Light & Power Co.* v. *Bynum*, 139 Alabama 389, the court said at page 395:

> "A passenger does not lose his character as such, and the care the company owes him, to transport him safely, by negligently assuming a dangerous position on the train."

In direct conflict with the principle applied in the foregoing decisions, the majority of the Circuit Court of Appeals in the instant case held that, since the rope must be assumed to have been in position at the top of the steps because of libellant's failure to overcome respondent's evidence that it was in position, the presence of the rope notified the libellant that he was forbidden to enter the pool. "Such information," the majority said, "however conveyed to him fulfilled respondents' duty to this libellant" (p. 905); and the presence of the rope having "withdrawn any general invitation to passengers to use the pool" the respondents "were under no duty to warn him of the dangers he would probably encounter in using it" (906). Since the use of the pool was thus forbidden entirely by the rope this "did away with any duty on the part of the respondents to advise him of specific risks he would encounter by going into the pool" (p. 906).

In other words the majority of the Circuit Court of Appeals held the mere presence of a rope assumed to have been across the top of the steps indicated by implication that libellant was forbidden to go into the pool and that that was all and everything in the nature of a warning or notice of the danger which respondent carriers were required to give libellant passenger to discharge

the legal duty of exercising the "highest" degree of care, the "utmost caution" and "extraordinary vigilance." We submit that it is obvious that a warning thus given by implication only was at most nothing more than a warning not to go into the pool and that it could not and would not give libellant any information as to the nature, character or extent of the risk that he would incur in entering the pool. As the District Court said in a finding undisturbed on appeal:

> "Libellant was a landsman and not a sailor, and was unaware of the inherent danger of going into this pool with 3½ to 5 feet of water, and under the conditions existing at the time. The danger was not too apparent to him * * * while he may not have known the degree of danger in entering the pool in the condition in which it was, nevertheless, he must have known it was somewhat dangerous" (Finding 54, p. 874).

There can be no question or doubt as to the conditions existing and here referred to which, combined with the partially filled pool, made it inherently dangerous at the time, namely the agitation of the water in the pool due to the rough seas and the rolling and pitching of this vessel, known to her officers to be noted for pitching.

Something more was required as a matter of law, we submit, than the mere placing of a rope across the steps to discharge the respondent carriers' duty of highest care, utmost caution and extraordinary vigilance to safeguard the libellant passenger; and libellant's admission that he would not go past such a rope, if it was in position, would not reduce or release the respondents from that duty of care. If the rope was in position, as the appellate court assumed, obviously it could not have had the effect of barring access to the pool or stopping the libellant from passing it because he did in fact pass it. It was not,

therefore, and could not have been the complete, effective warning required of respondents.

The insufficiency of the warning to the libellant given by the presence of the rope, assuming it was in position, was recognized by the Presiding Judge of the Circuit Court of Appeals, who disagreed with the majority that the mere presence of the rope would give libellant all warning he was entitled to receive:

> "A man may take some chances without taking other chances of which he has no warning. All that Erdman should be charged with was the general dangers which might be present when he went where passengers should not go; not with forseeing that, when the ship pitched, the swash of the water would have such force as it did. His disregard of his safety was not to be measured as exposing him to that specific danger" (p. 908).

The Chief Officer testified that this ship was "subject to pitching," and "in fact" was "noted for it" (fol. 1898). This was of course unknown to libellant, and undoubtedly was what Presiding Judge HAND referred to when he said that libellant could not be charged with foreseeing that "when the ship pitched, the swash of the water would have such force as it did" (p. 908). It has repeatedly been held that steamship passengers are neither required nor expected to anticipate the result of known and observed rolling or pitching of a vessel or the action of seas on a vessel.

Boston v. *Yarmouth S. S. Co.* v. *Frances,* 1 C. C. A., 249 Fed. 450;
The Korea Maru, 9 C. C. A., 254 Fed. 397;
The Arabic, 2 C. C. A., 50 Fed. (2) 96.

The Circuit Court of Appeals for the Second Circuit held in the *Arabic,* 50 F. (2d) 96 that when passengers

placed themselves in positions on deck which were dangerous because the ship was pitching and rolling in a hurricane, not only were the passengers entitled to warning of the danger in their positions, but that the warning must be brought home to the passengers in such a way as to make them appreciate the full extent of their danger. In that case one of the passengers, Miss McCague, had been warned by a deck steward not to sit at the forward end of the A deck. She sat in a chair at the after end of that deck. She testified she was not warned of any danger at the after end of the deck. The court said, that "several witnesses for the ship testified to giving" such warnings "but they could scarcely have been given in such a manner as to bring home to these inexperienced travellers an appreciation of their danger" (p. 99).

The failure of respondents to give libellant full warning of the extent and character of the danger which he was incurring by passing the rope, if it was in position, cannot be excused by any claim that they did not know that libellant had passed this rope and thus exposed himself to the danger which subsequently caused his injury. As Presiding Judge HAND said, when the steward Jensen, stationed at the pool, failed to warn libellant not to go into the pool it "was a failure in that extreme care which the law exacts of a carrier of passengers. The ship, having stationed a steward at the place, was charged with instructing him to tell passengers not to enter" (p. 908).

The testimony is undisputed that Jensen saw every movement made by libellant as he was about to enter the pool, and had full opportunity to warn him not to do so. Jensen testified that he was standing up on the platform around the pool on the starboard side about halfway between the forward and after end of the pool on the side which libellant used (fols. 1548-9); and that he was not more than 8 or 9 feet from the libellant at the time (fol.

1550). He testified also that he saw libellant proceed down toward the after end of the pool, saw him go up the steps to the platform around the pool (fol. 1539), saw him cross the platform and go down 5 or 6 rungs of the ladder leading to the pool (fols. 1539-40) and put his foot into the water to try it before going in (fol. 1642).

Libellant and other passengers on the ship gave similar testimony showing just what libellant did as he slowly proceeded toward and into the pool (DeVita, fols. 179-182; Erdman, fols. 440-441, 447-452, 458; Michael, fols. 798-812, 819). Not only were these facts established by uncontradicted testimony, but they were incorporated in the District Court's findings, undisturbed on appeal (Findings Nos. 14, 15, 23 to 30, 44 to 48, pp. 869 to 873), of which we quote three:

> "44. When libellant entered the pool, the attendant Jensen was about 8 or 10 feet away from libellant.
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> 45. Although it was apparent that libellant was about to enter the pool, Jensen remained mute and said nothing whatever to libellant.
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> 46. Jensen made no effort to warn libellant against going into the pool, nor did he warn libellant in any way as to any danger which might be encountered in going into the pool" (p. 873).

That Jensen realized it was dangerous for libellant to go into the pool and that he knew libellant should be warned against doing so is evidenced by Jensen's testimony that he actually did warn libellant not to go into the pool; first, when he heard some children talking to libellant about going into the pool (fols. 1532-33) and again when he saw libellant go up the steps leading to the platform around the pool (fol. 1539). The District Court expressly rejected Jensen's testimony that he gave these

warnings (Finding 48, p. 873), and specifically found that Jensen did not give any warning whatever to libellant and also found that it was apparent that the libellant was about to go into the pool (Findings 44, 45, 46, 47, 48, p. 873).

The majority of the judges of the Circuit Court of Appeals evidently considered this clear, undisputed testimony merely to determine whether the doctrine of "last clear chance" was applicable. Since they had concluded that respondents owed libellant no further contractual obligation as a passenger after he had passed the rope, their consideration of the undisputed testimony that Jensen saw libellant in his position of danger and did nothing about it was weighed not in the light of a duty still resting upon respondent carriers to a passenger, but merely as a general obligation such as respondents would owe to any stranger, namely, the duty of not causing injury to such a stranger when he has placed himself in a position of danger if they had the last clear chance of doing so.

Even in its consideration of whether the doctrine of last clear chance was applicable, the majority of the judges of the Circuit Court of Appeals seem to have been influenced to their decision by the fact that the District Court failed to make any finding that this doctrine was applicable. Since the District Court had already held that libellant was guilty of contributory negligence, it could not properly have made any finding that the doctrine was applicable in the present case, because this doctrine has no application where the injured party has been held guilty of contributory negligence. 11 Corpus Juris 283; *Robins* v. *Pennsylvania Co.*, 245 Fed. 435, 441 (C. C. A. 6); *Holmes* v. *Southern Pacific R. Co.*, 97 Cal. 161, 169.

Respondents' duty to libellant to notify him of the danger which he was incurring after he had passed the rope was not, under the decisions which we have cited hereinabove, the general duty owed by one stranger to

another not to injure him if there is a last clear chance to avoid doing so, but was the continuing, contractual obligation of the respondents, as carriers, to the libellant as a passenger to exercise the highest possible degree of care in looking out for his safety. The error of the majority of the judges of the Circuit Court of Appeals lies in its holding that the duty of respondents, as carriers, ended when libellant passed the rope and placed himself in a position of danger, a holding in direct conflict with the decisions hereinabove set forth.

Conclusion.

Because the decision of the majority of the judges of the Circuit Court of Appeals is in direct conflict with the decision of this court and with the decisions of the Circuit Courts of Appeal for the Ninth and First Circuits; because the decision is on an important principle of maritime law of wide application affecting every contract for the carriage of passengers by sea; and because the necessity for uniformity among the circuits in the admiralty law, as administered by them, has been repeatedly recognized by this court, we respectfully submit that a writ of certiorari should be granted in order that the question presented herein may be definitely and finally decided.

Respectfully submitted,

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